Victor Williams, Sole Proprietor, d/b/a Williams Insulation Company, a/k/a Thermal Solutions, Inc. *and* National Association of Heat and Frost Insulators and Asbestos Workers, Local 32. Case 22–CA–24665

June 24, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and first amended charge filed by the Union on June 28, 2001 and January 2, 2002, respectively, the General Counsel issued the complaint on January 31, 2002, against Victor Williams, Sole Proprietor, d/b/a Williams Insulation Company, a/k/a Thermal Solutions, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On March 16, 2004, the General Counsel filed a Motion for Default Judgment with the Board.[1] On March 18, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed within 14 days from service of the complaint, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated February 4, 2004, notified the Respondent that unless an answer was received by February 11, 2004, a Motion for Default Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a sole proprietorship, has been owned by Victor Williams, doing business as Williams Insulation Company, or Thermal Solutions Inc., with offices and places of business in Hillside and Elizabeth, New Jersey (the Respondent's facilities), and has been engaged as an insulation contractor in the construction industry doing residential and commercial construction.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Hillside and Elizabeth, New Jersey facilities goods valued in excess of $50,000 from at least one other enterprise (General Insulation Company Inc.) located within the State of New Jersey, which other enterprise had received these goods directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All mechanics and improvers engaged in the manufacture, fabrication, assembling, molding, handling, erection, spraying, pouring, mixing, hanging, preparation, application, adjusting, alteration, repairing, dismantling, reconditioning, testing, and maintenance of heat or frost insulation.

About February 1, 2001, the Respondent entered into a collective-bargaining agreement whereby it agreed to abide by the terms of the collective-bargaining agreement between the Union and the Heat and Cold Insulators Independent Contractors Asbestos Abatement, Removal Contractors, effective for the period September 19, 1998, to September 18, 2001, whereby it recognized the Union as the exclusive collective-bargaining representative of the unit and agreed to continue the agreement in effect from year-to-year thereafter unless timely notice was given. The collective-bargaining agreement has automatically extended to September 18, 2002.

[1] The General Counsel had previously filed a Motion for Default Judgment with the Board in this case on March 25, 2002. In an unpublished Order dated August 29, 2003, the Board denied that motion on the ground that the General Counsel had failed to prove service of the complaint on the Respondent. In support of the instant motion, the General Counsel has shown that the complaint was personally served on the Respondent on January 7, 2004.

The Respondent, an employer engaged in the building and construction industry, as described above, granted recognition to the Union as the limited exclusive collective-bargaining representative of the unit, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. For the period from February 1, 2001, to September 18, 2002, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.[2]

Since about February 1, 2001, the Respondent has refused to adhere to the collective-bargaining agreement.

CONCLUSION OF LAW

By the conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by refusing, from about February 1, 2001, to adhere to its 1998–2001 collective-bargaining agreement with the Union, which was automatically extended to September 18, 2002, we shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits they have suffered as a result of the Respondent's failure between February 1, 2001 and September 18, 2002, to continue in effect all of the terms and conditions of the agreement.[3] Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Respondent to make all contractually required contributions to fringe benefit funds that it failed to make between February 1, 2001 and September 18, 2002, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra,

[2] The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012 (1994).

[3] The Respondent entered into the collective-bargaining agreement with the Union on February 1, 2001, pursuant to Sec. 8(f) of the Act. At that time, the agreement was effective through September 18, 2001. The complaint further alleges that the Respondent agreed to continue the agreement in effect from year-to-year thereafter unless timely notice was given. The complaint also alleges that the collective-bargaining agreement automatically extended for 1 year until September 18, 2002. On these alleged facts, which have been effectively admitted by the Respondent, we find that the remedy in this case runs until September 18, 2002. *John Deklewa & Sons*, 282 NLRB 1375 (1987). See also, *James Luterbach Construction Co.*, 315 NLRB 976 (1994).

Our dissenting colleague would extend the remedy beyond September 18, 2002. We disagree. The complaint here alleges that the contract was effective until September 18, 2001, and was subject to renewal if no timely notices of cancellation were sent. However, the complaint alleged only one actual renewal (to September 18, 2002). The complaint is therefore subject to the reasonable reading that a renewal occurred for only 1 year.

Our finding in this regard, however, does not preclude the General Counsel from amending the complaint to allege that the parties' collective-bargaining agreement automatically renewed in September of 2002, 2003, or 2004. In the event that the Respondent again fails to file an answer, thereby admitting evidence that would permit the Board to extend the remedy beyond September 18, 2002, the General Counsel may renew the Motion for Default Judgment with respect to the amended complaint.

Member Liebman dissents from her colleagues' failure to provide for a remedy beyond September 18, 2002. Where, as here, a respondent has repudiated an 8(f) contract, the respondent should be ordered "to honor that contract *and any automatic renewal or extension of it*." *McKenzie Engineering Co*., 326 NLRB 473 fn. 3, 474 (1998) (emphasis added), enfd. 182 F.3d 622 (8th Cir. 1999). As the Board explained in *McKenzie Engineering*, such a remedial order appropriately "grant[s] the extent of recognition that is owed to a collective-bargaining representative in an 8(f) relationship." Id. at fn. 3 (citing *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988)). Accord: *South Alabama Plumbing*, 333 NLRB 16 fn. 2, 17 (2001) ("We amend the judge's remedy to provide that the Respondent is liable for honoring the July 15, 1996–July 14, 1998 collective-bargaining agreement for its term, *as well as any automatic renewal or extension of the contract*.") (emphasis added); *Energy Services International*, 343 NLRB No. 6, slip op. at 3–4 (2004) (the Board ordered the respondent "to honor the terms and conditions of the Inside Agreement, *and any automatic renewal or extension of it*.") (emphasis added). Ordering the Respondent to honor any automatic renewal or extension of the 1998–2001 collective-bargaining agreement is particularly appropriate in this case because the Respondent has effectively admitted the complaint allegation that it "agreed to continue the agreement in effect from year-to-year thereafter unless timely notice was given." Any dispute over whether such notice was given may be resolved at the compliance stage of this proceeding. *South Alabama Plumbing*, supra.

with interest as prescribed in *New Horizons for the Retarded*, supra.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Victor Williams, Sole Proprietor, d/b/a Williams Insulation Company, a/k/a Thermal Solutions, Inc., Hillside and Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to adhere to the 1998–2001 collective-bargaining agreement between the Union and the Heat and Cold Insulators Independent Contractors Asbestos Abatement, Removal Contractors, which was automatically extended to September 18, 2002, covering the employees in the following unit:

> All mechanics and improvers engaged in the manufacture, fabrication, assembling, molding, handling, erection, spraying, pouring, mixing, hanging, preparation, application, adjusting, alteration, repairing, dismantling, reconditioning, testing, and maintenance of heat or frost insulation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its unlawful refusal to adhere to the collective-bargaining agreement from February 1, 2001 to September 18, 2002, and reimburse them for any expenses ensuing from its failure to make contractually required contributions to fringe benefit funds, with interest, as set forth in the remedy section of this decision.

(b) Make all contractually required contributions to fringe benefit funds that it has failed to make between February 1, 2001 and September 18, 2002, and as set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Hillside and Elizabeth, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 24, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

[4] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to adhere to the 1998–2001 collective-bargaining agreement between the Union and the Heat and Cold Insulators Independent Contractors Asbestos Abatement, Removal Contractors, which was automatically extended to September 18, 2002, covering the employees in the following unit:

All mechanics and improvers engaged in the manufacture, fabrication, assembling, molding, handling, erection, spraying, pouring, mixing, hanging, preparation, application, adjusting, alteration, repairing, dismantling, reconditioning, testing, and maintenance of heat or frost insulation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our unlawful refusal to adhere to the collective-bargaining agreement from February 1, 2001 to September 18, 2002, and reimburse them for any expenses ensuing from our failure to make contractually required contributions to fringe benefit funds, with interest.

WE WILL make all contractually required contributions to fringe benefit funds that we have failed to make between February 1, 2001 and September 18, 2002, with interest.

VICTOR WILLIAMS, SOLE PROPRIETOR, D/B/A WILLIAMS INSULATION COMPANY, A/K/A THERMAL SOLUTIONS INC.